Supreme Court, U. S.
FILED
SEP 3 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY NORTON, JR., ETC.,

Appellant,

v.

F. DAVID MATHEWS,
Secretary of Health, Education,
and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the single district judge on the nonconstitutional aspect of this case is reported as *Norton v. Richardson*, 352 F.Supp. 596 (D. Md. 1972) (App. 22). The original opinion of the three-judge

district court on all aspects of this case is reported as *Norton v. Weinberger*, 364 F.Supp. 1117 (D. Md. 1973) (App. 31). The three-judge district court's majority and dissenting opinions, issued after this Court's remand, 418 U.S. 902 (1974), are reported as *Norton v. Weinberger*, 390 F.Supp. 1084 (D. Md. 1975) (App. 70).

JURISDICTION

A three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 & 2284, entered its final judgment (App. 96) in this case on February 28, 1975, denying appellant's request for an order permanently enjoining enforcement of certain provisions of 42 U.S.C. § 416(h)(3)(C). The notice of appeal to this Court was filed on March 17, 1975 (App. 97). As is explained in Part I, *infra*, this Court's jurisdiction is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether subject-matter jurisdiction vested in the district court so as to require the hearing of this case by a three-judge court and thereby permit appeal to this court pursuant to 28 U.S.C. § 1253.

2. Where paternity is not at issue, whether the provisions of the Social Security Act which require certain illegitimate children to prove actual dependency on a deceased wage earner in order to qualify for social security child's insurance benefits, while irrebuttably

presuming such a showing by legitimate children and other classes of illegitimate children, violate the due process clause of the Fifth Amendment.

STATUTES INVOLVED

42 U.S.C. § 405(g):

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business . . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .

42 U.S.C. § 405(h):

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

28 U.S.C. § 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

42 U.S.C. § 402(d)(1):

Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child–

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual–

* * *

(ii) if such individual has died, at the time of such death,

* * *

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

42 U.S.C. § 402(d)(3):

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such

individual was not living with or contributing to the support of such child and–

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

42 U.S.C. § 416(h)(2) & (3):

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage

ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(b), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * *

(C) In the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

STATEMENT

The appellant, Gregory Norton, Jr., is an illegitimate child who qualified in all respects for child's insurance

benefits pursuant to Section 216(h)(3)(C) of the Social Security Act except that he was found by the Social Security Administration to have failed to establish that his deceased father was living with him or contributing to his support at the time of his father's death, as required by subsection (ii) of that section, 42 U.S.C. § 416(h)(3)(ii) (App. 18). Such proof is not required, and, in fact, irrebuttably presumed, for legitimate children and certain other illegitimate children. If appellant were legitimate or had fallen into the other classification of illegitimate children, he would have been found eligible for child's insurance benefits and now be receiving them.

The Social Security Act sets up two categories of children with respect to proving eligibility for child's insurance benefits. To be eligible, legitimate children need merely establish that their fathers were wage earners covered by the Act and that they were their fathers' children. The Act does not require them to establish any degree of dependency on their fathers since by operation of law they are deemed to have been dependent. *See* 42 U.S.C. § 402(d)(3).

Certain illegitimate children are also irrebuttably presumed dependent on their fathers. This presumption applies to those illegitimate children who are the children of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed, *see* 42 U.S.C. § 402(d)(3) and 416(h)(2)(B); those who establish their fathers' paternity by a written acknowledgement, court paternity decree, or court support order, *see* 42 U.S.C. §§ 402(d)(3) and 416(h)(3)(C)(i); and those who could establish paternity under their state's intestate succession law. *See Jimenez v. Weinberger*, 417 U.S. 628, 631 n.2 (1974).

All other illegitimate children who have satisfactorily established their fathers' paternity are not benefited by this presumption. Instead, they must establish the additional element that they were living with or supported by their father at his death. *See* 42 U.S.C. § § 402(d)(3)(A) and 416(h)(3)(C)(ii).

Appellant was born out of wedlock in 1964 to Gregory Norton, Sr., then 16, and Laurie Marie Brown, then 14 (App. 15). Both teenage parents were high school students living with their respective parents; they never married and never actually lived together (App. 17). At Gregory, Jr.'s birth, his father "contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time." (App. 26). Soon thereafter Gregory, Sr. entered the Army and, at age 19, was killed while serving in Vietnam (App. 15). Although prior to his death he had made attempts to authorize a military allotment for Gregory, Jr., this procedure was incomplete at the time of his death. (App. 28).

Gregory Norton's application to the Social Security Administration for child's insurance benefits on his deceased father's account was filed in September 1969 (App. 13). After administrative review, an Administration hearing officer found that Gregory had met all of the requirements for child's insurance benefits, including the establishment of his father's paternity, but that he had failed to prove that he had lived with or been supported by his father (App. 18). Because of this failure, he was held to be ineligible for these social security benefits (App. 19). After the Appeals Council of the Social Security Administration declined to review

this case (App. 20), a timely complaint was filed in the district court (App. 3).

In his complaint in this action, Gregory Norton, individually and on behalf of those similarly situated, sought declaratory and injunctive relief on due process and equal protection grounds against the requirement that he and his class establish their fathers' "support and residency" with them in addition to paternity. Alternatively, assuming the constitutionality of this extra burden on illegitimate children, appellant asserted that he in fact had met this statutory requirement and therefore should be entitled to monthly child's insurance benefits.

The district judge initially assigned to the case resolved this latter nonconstitutional issue while sitting as a single district judge. He upheld the Secretary's determination that Gregory Norton's evidence was insufficient to establish that his father had lived with or supported him at the time of his death (App. 22).[1] A three-judge court was then convened to hear the constitutional issue (App. 1).

While acknowledging the propriety of class certification (App. 35),[2] the three-judge court upheld the constitutionality of the extra-proof requirement after

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[1] *Norton v. Richardson*, 352 F.Supp. 596 (D. Md. 1972).

[2] The court certified this case as a class action brought on behalf of:

> all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirements of 42 U.S.C. §416(h)(3)(c)(ii) that they be living with or supported by their father on the date of his death.

concluding that the purpose of the Social Security Act was to provide benefits to actual dependents of deceased wage earners (App. 46-48) and accordingly it was not improper for the Act to presume dependency for those classes most likely to have actually been dependent, while requiring actual proof of dependency from those classes of illegitimate children less likely to have been actually dependent (App. 48). The court concluded that because the dependency requirement placed on appellant's class did not lack a rational relationship to the Social Security Act's purpose or intent, it therefore was not violative of the due process clause of the Fifth Amendment (App. 53).[3]

Acting on appellant's initial appeal, this Court vacated the district court's judgment and remanded the case for reconsideration in light of *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (App. 62).[4] Upon remand, the district court, with one judge dissenting, reaffirmed its original holding. (App. 70).[5] This appeal was then timely noted. (App. 97).

In setting this case for oral argument, this Court postponed its determination of jurisdiction in order that the implications of *Weinberger v. Salfi*, ____ U.S. ____ (1975), regarding appellate jurisdiction in this case could be briefed (App. 99).

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[3] *Norton v. Weinberger*, 364 F.Supp. 1117 (D. Md. 1973).

[4] *See Norton v. Weinberger*, 418 U.S. 902 (1974).

[5] *Norton v. Weinberger*, 390 F.Supp. 1084 (D. Md. 1975).

SUMMARY OF ARGUMENT

I. JURISDICTION

The major jurisdictional issue posed in this case turns on the breadth of the district court's subject-matter jurisdiction. If the district had proper subject-matter jurisdiction and was able to properly utilize it to grant the relief appellant and his class requested–a class-wide injunction based upon a claim of constitutional invalidity preventing enforcement by the Secretary of a part of the Social Security Act–then it was properly convened as a three-judge court pursuant to 28 U.S.C. § 2282. An appeal from its denial of an injunction would then properly lie with this Court. *See* 28 U.S.C. § 1253.

Appellant and his class of illegitimate children submit that subject-matter jurisdiction properly existed under any of three alternative statutory sources: the provision for Social Security Act claims review, 42 U.S.C. § 405(g); mandamus review, 28 U.S.C. § 1361; or the Administrative Procedure Act, 5 U.S.C. § § 701 *et seq.*

The clearest of these bases–42 U.S.C. § 405(g)–was pointed out in this Court's recent opinion in *Weinberger v. Salfi*, ____ U.S. ____ (1975). Appellant has exhausted his full administrative remedies as required by 42 U.S.C. § 405(h). His class, as properly defined, has done so also. Under an analogous line of this Court's cases, it is clear that (1) a district court exercising section 405(g) jurisdiction has the inherent equity power to issue injunctive and class-wide relief and (2) nothing in the Act in any way bars the issuance of this type of relief. Accordingly, because the district court was requested and was empowered to issue

injunctive relief invalidating a portion of the Act on constitutional grounds, it was properly convened as a three-judge court. An appeal from its denial of injunctive relief must therefore be to this Court.

Subject-matter jurisdiction could alternatively exist under 28 U.S.C. § 1361 or 5 U.S.C. § § 701 *et seq.* Neither is specifically prohibited by 42 U.S.C. § 405(h)'s bar to any cases brought pursuant to former section 41 of Title 28. Mandamus jurisdiction has common-law roots and was not a part of Title 28 when section 405(h) was enacted. The provisions for judicial review of administrative actions in Title 5 of the United States Code were similarly not barred by a reference to old section 41 of Title 28. Because the other basic preconditions for these two jurisdictional bases have been met, either could have served the district court in entertaining the requested injunctive relief. These jurisdictional routes would similarly have required the convening of a three-judge court and a consequent appeal to this Court.

Through any of these alternative routes, therefore, appellant and his class are now properly before this Court.

II. THE MERITS

Section 416(h)(3)(C)(ii) of the Act requires appellant's class of illegitimate children to prove both paternity and the fact that they were supported by or lived with their deceased father in order to receive child's insurance benefits on their father's social security account. Legitimate children and other classes

of illegitimate children, however, need only establish their proper paternity; no "support or residency" precondition is required of them.

Appellant and his class contend that this classification is unjustified by any legitimate purpose and accordingly discriminates against them in violation of the Fifth Amendment's due process guarantee.

There appear to be two potential justifications which could be asserted by the Secretary to uphold the validity of this classification against illegitimate children. First, as was adopted by the Secretary and the district court below, the Act's purported purpose was to give child's insurance benefits only to those children more likely to have been actually supported by their father prior to his death. Because appellant's class was not likely to have been supported, while the other classes were likely to have been supported, it is reasonable, the court concluded, to require proof of actual prior support by appellant's class.

Appellant denies, however, that the Act was intended as it applies to illegitimate children to require actual prior support. Rather, the child's insurance program was to serve those orphans who were actually supported or who were entitled to be supported by their deceased father. This being the broader purpose of the program, section 416(h)(3)(C)(ii) has deviated from this purpose by requiring appellant's class—whose fathers owed them a duty of support but never lived up to it—to prove actual prior support. Appellant's view of this broader purpose of the child's insurance program is made clear by reference to the evolution of the "support or residency" requirement in the overall survivors' insurance program beginning in 1939; the specific legislative

history of section 416(h)(3)(C)(ii), which refers to "an obligation" to previously support as well as actual prior support; and the Act's construction which requires no other legitimate or illegitimate children to prove support or residency.

Alternatively, if the program was intended to provide support only to the children of those actually supported by their father prior to his death, this goal was carried out with such arbitrariness and unfairness as to nevertheless be violative of Fifth Amendment due process. Such a scheme could not survive this Court's requirements of heightened scrutiny regarding discrimination against illegitimate children. The program's assumptions as to who was likely to have actually been supported and who was not are without any concrete factual support. Indeed, it is shown that many of them are in reality reversed. The tragic irony of any such purpose would be that it heaps a double injury upon a traditionally disadvantaged class: not only did these children have to suffer from their father's failure to support them *prior* to his death, but the Act would now perpetrate this harm by denying benefits *after* his death.

Although the district court ignored it and the Secretary appears to have rejected it, a second purported purpose to justify the special support or residency requirement might be resurrected in this appeal. As is often asserted in public benefits litigation, the requirement might serve as a safeguard against fraudulent claims of paternity. If the fathers of illegitimate children lived with or supported them while alive, this is a safe indicator that paternity actually existed.

Any such purported purpose, however, could only be a lawyer's after-the-fact rationalization. Nowhere in the program's legislative history is such an intent evidenced. The structure of the Act and the Secretary's administration of the program both indicate that the support or residency requirement was viewed as a precondition relating to economic dependency, not a means of bolstering proof of paternity. The Secretary has concurred in this view in the district court below. Any "spurious claim" avoidance purpose, therefore, would appear to be farfetched and not envisioned by Congress.

Nevertheless, as with the "prior actual support" purpose, if it had been actually intended, it has not validly been pursued. The Secretary has shown that many informal means exist by which paternity can be proved by an illegitimate child. There is no valid reason to limit such proof to one form—support or residency—when to do so would bar many children who the program was intended to benefit. As the Secretary's administrative manual has indicated, various efficient and fool-proof mechanisms now exist to guard against spurious claims of paternity. The sufficiency of these means, and the arbitrary over breadth of the support or residency requirement, combine to make this scheme unnecessary and arbitrary.

There being no legitimate governmental interest that is properly promoted by the support or residency requirement as it affects appellant and his class, its operation should be enjoined.

ARGUMENT

I.

THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. §1253

In order to establish this Court's jurisdiction to hear this appeal, appellant will first show that, under any of several bases, the district court possessed the power to grant the relief sought in this case. Appellant will then show that, because he and his class sought an injunction restraining the enforcement of an allegedly unconstitutional Act of Congress, a three-judge court was required to hear this case. *See* 28 U.S.C. § 2282. Finally, because this is an appeal from the denial of an injunction by a statutorily required three-judge district court, jurisdiction of the appeal lies in this Court. *See* 28 U.S.C. § 1253.

A. Subject-Matter Jurisdiction Vested In The District Court

Appellant's complaint raised four grounds upon which the district court could have properly exercised subject-matter jurisdiction: federal mandamus, 28 U.S.C. § 1361; Social Security Act review, 42 U.S.C. § 405(g); federal-question jurisdiction, 28 U.S.C. § 1331; and Administrative Procedure Act review, 5 U.S.C. §§ 701 *et seq.* (App. 4). The district court relied for subject-matter jurisdiction upon the first three of these sources (App. 23).

1. Jurisdiction And Full Remedial Power Exists Under 42 U.S.C. §405(g)

In *Weinberger v. Salfi*, ____ U.S. ____ (1975), the Court put its blessing in a case such as this upon the jurisdictional base for judicial review of social security Title II claims, 42 U.S.C. § 405(g). An analysis of *Salfi* indicates that this jurisdictional predicate is equally applicable to this case. Furthermore, there is nothing in section 405(g) to in any way restrict the court's normal power to issue full equitable relief. It therefore was empowered to grant the complete relief requested by appellant and his class.

Because the named plaintiff in this case, Gregory Norton, Jr., alleged in his complaint (App. 8) and, in fact, fully exhausted all Social Security administrative hurdles before bringing his timely action in the district court (App. 20), there can be no doubt that the district court had subject-matter jurisdiction over his individual claim under 42 U.S.C. § 405(g). As is shown below, the court was also empowered under section 405(g) to grant full class, injunctive and declaratory relief as well.

a. District Courts Can Fashion Full Equitable Relief in a Section 405(g) Case

In a long series of cases this Court has approved the use by lower federal courts of their inherent equitable powers to fashion full relief to parties in instances where the statute conferring subject-matter jurisdiction did not specifically provide for broader equitable relief. This case surely falls within that pattern.

In a very similar setting in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), this Court met the issue of whether judicial review under the Emergency Price Control Act of 1942 was limited to those types specifically enumerated in the statute, rather than to broader equitable relief. In reading the district court's power to encompass broader relief, the Court stated:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." . . . It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Id. at 398. *See also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

In a similar jurisdictional setting in *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364 (1939), the Court reiterated these same views:

> The jurisdiction to review orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.

305 U.S. at 373. *Accord United States v. Morgan*, 307 U.S. 183, 191 (1939).

The district court could also have exercised the specific power conferred by the All Writs statute, 28 U.S.C. § 1651, to grant auxiliary relief, such as by a declaration of rights and an injunction. Federal courts are empowered to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In order to frame a decree which "secures a just result" in this case, the district court must have the injunctive tool at its avail. As this Court emphasized in *Flemming v. Nestor*, 363 U.S. 603 (1960), an individual judgment for Gregory Norton

> would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of appell[ant's] benefits.

Id. at 607. Norton and his class rightfully seek more. They have requested relief that guarantees that payments also be made to those illegitimate children wrongfully denied child's insurance benefits in the past

or who presently have similar claims pending (App. 10-11). Injunctive relief is necessary to guarantee this result. And the potential power of contempt which only accompanies this relief could be necessary to assure compliance. *Compare Aberdeen & Rockfish R.R. v. S.C.R.A.P.*, ____ U.S. ____, ____ n.11 (1975). The district court's power to declare a portion of the Social Security Act unconstitutional would be an empty one if it lacked a remedy to stop enforcement of that part of the Act.

If an injunction is the only adequate and full relief available to plaintiffs in a federal court action, the court's inherent equity powers allow it to grant such relief in order to restrain an administrative agency. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Degge v. Hitchcock*, 229 U.S. 162, 170 (1913). And even if the statute allowing for judicial review makes no mention of injunctive relief, this form of equitable relief can still be granted, if necessary, to protect the rights asserted. *See Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56, 59-60 (1939); *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942).

Furthermore, even language in a statute apparently precluding review–which is not present in sections 405(g) or (h)–could not easily bar full equitable relief. As the Court said in *Porter v. Warner Holding Co.*, *supra*:

> The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503. See also Hecht Co. v. Bowles, supra 321 U.S. 330.

328 U.S. at 398.

There is no reference in sections 405(g) or (h), much less a "clear legislative command," that the granting of traditional equitable powers is to be precluded. Section 405(g) provides in part:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . .

This section in no way intimates that the power to affirm, modify, or reverse is the only power a district court would have. Furthermore, the power to reverse surely does not preclude the power to do so by injunction. If anything, it supports such power.

This indeed would be a reasonable result. If a properly convened district court confronts an unconstitutional portion of the Social Security Act, it should, if requested, declare it invalid and enjoin its usage. To do otherwise would either force others in the same situation to be denied benefits based on an invalid portion of the statute, or else invite a multiplicity of suits to deal with this issue each time it arose. Injunctive relief in this instance is not only permitted, it is in fact the most intelligent and efficient manner with which an unconstitutional Social Security Act provision could be handled.

b. Class Relief is Appropriate and Permitted Under Section 405(g)

The *Salfi* case has clearly implied that class relief is available to a court exercising section 405(g) jurisdiction. *Salfi* denied class relief not because anything in section 405(g) precludes this form of relief, but because the class was improperly formed in the specific setting of that case. ____ U.S. at ____. Because class relief is fully necessary in order to do full justice in this case, the district court, upon remand, should grant injunctive relief not just to Norton, but to his class as well.

There is a significant practical consequence in permitting class-wide relief in this case. The district court should act to guarantee that all others similarly situated will be made whole after the Act's past improper implementation. Class relief is required for those who have wrongly been denied benefits in the past and who should therefore now have their situation corrected by the Administration. The district court should order the Secretary to notify the entire class of its eligibility for benefits. Otherwise, the past improper implementation of the Act would not be remedied. Only in this way could the district court "do complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. at 398.

If one court could not act in a complete fashion to fully remedy this problem, each person's remedy would be to sue individually throughout the country. Not only would this create an unnecessary multiplicity of litigation, but it would also burden a host of illegitimate children with the need to (1) learn of their new found right and (2) secure counsel to enforce it.

Because of the frequent poverty and lack of education generally found among illegitimate children,[6] this is an impossible task. Consequently, class relief is a part and parcel of the necessary and appropriate full relief required in this case.

The three-judge court declared that this action met the prerequisites of Fed. R. Civ. P. 23(b)(2) and should therefore proceed as a class action consisting of

> all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death.

(App. 35).[7] This definition should meet the Court's exhaustion requirements as outlined in *Salfi*.

In order to be "otherwise eligible" for child's insurance benefits, each class member must have applied for benefits and have received a decision by the Secretary that he met each conditiion of eligibility but for the extra proof requirement of 42 U.S.C. § 416(h)(3)(C)(ii). This decision of ineligibility would therefore be the jurisdictional precondition for judicial

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[6] The district court in a similar case recognized that "common observation teaches that illegitimacy and indigency are often handmaidens." *Griffin v. Richardson*, 346 F.Supp. 1226, 1232 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

[7] The court never formalized this holding in its final judgment (App. 59) and thereby ran afoul of Fed. R. Civ. P. 23(c)(3). *Compare Board of School Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 130 (1975). This technical oversight can easily be remedied on remand.

review set forth by section 405(g), *i.e.*, the "final decision of the Secretary made after a hearing . . . ."

Nevertheless, if the district court's class definition does not, for this Court's purposes, sufficiently articulate the exhaustion requirements that must have been met by the class, on remand the judgment could be worded to ensure that the class includes only those who have exhausted their administrative remedies.

c. Conclusion

From the foregoing it is clear that 42 U.S.C. § 405(g) not only provided the district court with subject-matter jurisdiction, but also empowered it to grant complete, class-wide, injunctive relief in this case.

2. Jurisdiction Alternatively Exists Under 28 U.S.C. §1361

Another clear basis for subject-matter jurisdiction in this case is provided by 28 U.S.C. § 1361, the Mandamus and Venue Act of 1962. Not only does this case fall directly within the mandamus guidelines that traditionally have been set by the federal courts, but there is nothing in 42 U.S.C. § 405(h), as interpreted by this Court in *Weinberger v. Salfi, supra,* to preclude this type of jurisdiction. If, for some reason, full relief could not be achieved under section 405(g), the district court could reach this result based upon mandamus jurisdiction.

a. The Traditional Prerequisites of Mandamus Jurisdiction Have Been Met in This Case

Prior to 1962, mandamus jurisdiction only existed for original actions brought in the federal courts for the District of Columbia.[8] This source of jurisdiction did not arise from Title 28 or another federal statute but from the laws of the State of Maryland which governed the area ceded to the District of Columbia in 1801.[9] Thus, prior to 1962, mandamus jurisdiction did not exist in the United States District Court for the District of Maryland.[10]

The Mandamus and Venue Act of 1962 broadened this jurisdictional base so that parties can now utilize it in actions against government officials in federal district courts outside the District of Columbia.[11] The Act provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to

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[8] *Compare M'Intire v. Wood,* 11 U.S. (7 Cranch) 504 (1813) *with Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838).

[9] *See Kendall v. United States ex rel. Stokes, supra,* 37 U.S. (12 Pet.) at 621; Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479, 1499-500 (1962).

[10] For a compilation of Supreme Court cases holding that district courts outside the District of Columbia were not empowered with independent mandamus jurisdiction, see *Marshall v. Crotty,* 185 F.2d 622, 627 (1st Cir. 1950).

[11] *See* S. Rep. No. 1992, 87th Cong., 2d Sess. (1962); 1962 U.S. Code Cong. & Adm'n News 2785; K.C. Davis, Administrative Law Treatise § 23.09 (1970 Supp.).

> compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The jurisdiction conferred by section 1361 was intended by Congress to be:

> limited to compelling a Governmental official or agency to perform a duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision.[12]

It also appears that Congress intended resort to mandamus to be a "nonstatutory" method of review available only when "a statute does not specifically provide for review of the actions of a Government official . . . ."[13]

Although this Court has apparently not yet had the occasion to do so,[14] the many circuits courts which have dealt with 28 U.S.C. § 1361 since 1962 have recognized it as a valid grant of independent subject-matter jurisdiction and have sanctioned its use in situations involving (1) a clearly defined and ministerial duty upon a federal governmental official, (2) a clear and certain right to relief for the plaintiff and (3) no other adequate remedy.[15]

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[12]S. Rep. No. 1992, *supra.*

[13]*Id.*

[14]*But cf. Christian v. New York State Dept. of Labor,* 414 U.S. 614, 617 n.3 (1974).

[15]Most, if not all, of the Circuits have reached these conclusions. *See, e.g., Prairie Band of Pottawatomie Tribe of Indians v. Udall,* 355 F.2d 364, 367 (10th Cir. 1966); *Carter v. Seamans,* 411 F.2d 767, 773 (5th Cir. 1969); *Burnett v. Tolson,* 474 F.2d 877, 880 (4th Cir. 1973); *United States v. Walker,* 409 F.2d 477, 481 (9th Cir. 1969). Some Circuits hold, however, that mandamus will also lie to correct an agency's abuse of discretion. *See, e.g., Nixon v. Secretary of Navy,* 422 F.2d 934, 939 (2d Cir. 1970); *Peoples v. United States Department of Agriculture,* 138 U.S. App. D.C. 291, 295, 427 F.2d 561, 565 (1970). This latter issue is not present in this case.

[16]Mandamus is an appropriate jurisdictional base where the duty sought to be enforced stems from the Constitution. *See, e.g., Martinez v. Richardson,* 472 F.2d 1121, 1126 n.12 (10th Cir. 1973); *Walker v. Blackwell,* 360 F.2d 66, 67 (5th Cir. 1966). If an Act of Congress is challenged as being unconstitutional, as in this case, mandamus jurisdiction cannot be avoided by a government official's claim that he was following his duty by acting pursuant to this source of authority. *See Richardson v. United States,* 465 F.2d 844, 850 (3d Cir. 1972) (en banc), *r'v'd on other grounds,* 418 U.S. 166 (1974); *Griffin v. Richardson,* 346 F.2d 1226, 1230 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

Appellant's case fits well within these jurisdictional confines. The duty and right alleged are purely ministerial and require no judgment exercises of discretion in their implementation.[16] Appellant's class of illegitimate children either must or must not shoulder extra burdens of proof in order to qualify for social security benefits. Once this Court resolves this issue, the Secretary's course will be clearly defined. Furthermore, if jurisdiction does not exist pursuant to 42 U.S.C. § 405(g), as is discussed in Part I.A.1, *supra,* in a manner to grant full class injunctive relief, no other remedy appears to exist for this class. Thus, this case meets the statutory prerequisites for mandamus jurisdiction.

b. Mandamus Jurisdiction is Not Precluded by 42 U.S.C. §405(h)

A. Section 405(h)'s sentence barring review under jurisdictional bases between sections 1331 and 1359 of Title 28 does not bar review of this case under section 1361 of Title 28

Section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), provides in part:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover on any claim arising under this subchapter.

It is this provision upon which the Court focused in *Weinberger v. Salfi, supra.* This section, however, does not preclude review under 28 U.S.C. § 1361.

When section 405(h) was first enacted in 1939,[17] Section 41 of Title 28 of the United States Code consisted of several subject-matter jurisdiction grants to the federal courts.[18] It did not include, however, the common-law rooted mandamus jurisdiction existing in the District of Columbia. In 1948, these jurisdictional grants were recodified into their present numerical form.[19] What had been section 41 became Sections

[17]*See* Social Security Act Amendments of 1939, ch. 666, Title II, § 201, 53 Stat. 1362.

[18]*See* 28 U.S.C. § 41(1) *et seq.* (1940 ed).

[19]Section 41 of Title 28 was repealed by the Act of June 25, 1948, ch. 646, 63 Stat. 992, which took effect on September 1, 1948.

1331 to 1348, 1350 to 1357, 1359, 1397, 1399, 2361, 2401 and 2402 of Title 28 of the Code.

The reference in section 405(h) to those jurisdictional bases contained in former Section 41 of Title 28, therefore, did not refer to mandamus jurisdiction as it existed prior to recodification in 1948. It, of course, also did not refer to many other bases of subject-matter jurisdiction which are not found between sections 1331 and 1359 of Title 28. Therefore, prior to 1962, a mandamus-based case such as this surely could have been brought in the District of Columbia. Furthermore, no change has been made in section 405(h) after that time to in any way refer to the limited pre-1962 mandamus, or to its present form in 28 U.S.C. § 1361. Thus, section 1361 jurisdiction is in no way precluded by the words of the last sentence of section 405(h).

If a mandamus-based action could have been brought in the District of Columbia prior to 1962 and not have been barred by section 405(h), and if the Mandamus and Venue Act merely extended the type of pre-1962 mandamus existing in the District of Columbia to the rest of the nation, then section 405(h) should be no bar to mandamus today.

The clarity of the words used in the last sentence of section 405(h) leaves no room for resort to other forms of statutory construction. But even if such construction were utilized, there exists no supporting legislative history[20] or other method of interpretation to allow a court to broaden section 405(h) so that it refers to, and

[20]*See* H.R. Rep. No. 728, 76th Cong., 1st Sess. 19, 43-44; S. Rep. No. 734, 76th Cong., 1st Sess. 21, 52.

thereby precludes mandamus jurisdiction. For example, the sentence in section 405(h) might have specifically, precluded *all* other forms of review. *Compare* 38 U.S.C. § 211(a). It did not follow this route, however, instead only precluding certain enumerated forms of judicial review, not including mandamus jurisdiction. This form of statutory construction consequently bolsters appellant's jurisdictional claim.

Because section 405(h) fails to preclude suits against the Secretary based upon mandamus jurisdiction, be it the limited pre-1962 variety or its present broader form, it is no bar to the exercise of this form of jurisdiction by the district court in this case.

B. Section 405(h)'s sentence barring review of a "decision of the Secretary," does not preclude this challenge to the validity of a decision of Congress.

Although in *Salfi* the Court primarily focused upon the third sentence in section 405(h), it could plausibly be argued that the section's second sentence is another attempted bar to non-405(g) jurisdiction. It reads:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

Further inquiry clearly indicates, however, that this sentence could not have been intended to preclude other forms of review, such as a constitutional attack on the statute by mandamus jurisdiction.

In *Johnson v. Robison*, 415 U.S. 361 (1974), the Court interpreted another nonreview provision relating

to the Veterans' Administration, 38 U.S.C. § 211(a), which provides in relevant part:

> The decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The Court interpreted this provision to only preclude review of "decisions of the Administrator." 415 U.S. at 367. Because the attack in *Robison* was against a decision made by Congress–*i.e.*, the validity of the statute–judicial review was not precluded by 38 U.S.C. § 211(a). *Id.* This same reasoning was reasserted by the Court in *Salfi*. *See* ____ U.S. at ____.

Section 405(h) should be given this same interpretation. At the very most, only review of a "decision of the Secretary" could be barred. It would therefore not bar other forms of review of decisions of Congress–as are confronted in this case.

A second vantage point reinforces the conclusion that this sentence was not intended to bar other jurisdictional bases. If such an intention were present, why did Congress enact the third sentence of section 405(h)? If the second sentence were intended to preclude all other forms of jurisdiction, there would have been no need to preclude the several specific jurisdictional provisions referred to by section 405(h)'s third sentence (28 U.S.C. 1331 *et seq.*). The second sentence must therefore be read in a manner which makes the third sentence meaningful. *Accord Weinberger v. Salfi*, ____ U.S. at ____, ____ n.6. It can

only have real meaning if its "except as herein provided" clause was an attempt (albeit an awkward one) to refer to the third sentence, but not to go beyond its specific preclusions.[21]

C. Conclusion

It can therefore be seen that appellant and his class have met the statutory prerequisites for the exercise of district court mandamus jurisdiction. Furthermore, this form of judicial review is not barred by 42 U.S.C. § § 405(g) or (h), which can in no way establish the necessary "clear and convincing" congressional intent in order to restrict this form of judicial access. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). The district court therefore alternatively had subject-matter jurisdiction over this case under 28 U.S.C. § 1361.

3. Jurisdiction Alternatively Exists Under The Administrative Procedure Act

Appellant also alleged jurisdiction under the Administrative Procedure Act, 5 U.S.C. § § 701 *et seq.* For the

[21]This latter reading–that the real import of the second sentence is measured and limited by the specific references of the third sentence–is reinforced when it is recognized that the second sentence could never stand alone. If it did, its extremely broad and ambiguous language would bar other forms of review of, for example, the Secretary's firing of a Social Security Administration employee on an allegedly racial basis. Thus, the second sentence has to be meant to be strictly curtailed by the third sentence.

same reasons set forth in dealing with mandamus jurisdiction, there is no reference in section 405(h) to this form of subject-matter jurisdiction being exercised to correct an invalid statute. Accordingly, assuming the A.P.A. provides an independent base of subject-matter jurisdiction, it is not precluded in this case.

The circuits are currently split on whether the A.P.A. empowers district courts with independent subject-matter jurisdiction.[22] The decisions of this Court can be read to affirm the existence of A.P.A. jurisdiction. *See, e.g., Rusk v. Cort*, 369 U.S. 367 (1962); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); K.C. Davis, Administrative Law Treatise § 23.02 (1970 Supp.). A reading of the statute makes this result exceedingly reasonable.

The A.P.A. provides that "a person ... adversely affected or aggrieved by agency action ... is entitled to judicial review thereof." 5 U.S.C. § 702. In acting upon such a request for review, the district court may entertain "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction ...." 5 U.S.C. § 703. The reviewing court is empowered to "hold unlawful and set aside agency action ... found to be ... contrary to constitutional right ...." 5 U.S.C. § 706(2)(B).

[22]*Compare Bradley v. Weinberger*, 483 F.2d 410, 413-14 (1st Cir. 1973); *Brennan v. Udall*, 379 F.2d 803, 805 (10th Cir. 1967); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1109-110 (D.C. Cir. 1974), *with Zimmerman v. United States*, 422 F.2d 326, 330 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); *Arizona State Dept. of Public Welfare v. H.E.W.*, 449 F.2d 456, 464 (9th Cir. 1971).

Although the legislative history behind this enactment fails to further elucidate Congress' intent,[23] the clarity of the statute makes resort to judicial construction unnecessary.[24] Because there exists no other statute precluding review under the A.P.A.,[25] this alternative source of subject-matter jurisdiction exists in this case.

4. Conclusion

For the foregoing reasons, subject-matter jurisdiction exists in this case. If the result were otherwise, the Secretary's allegedly unconstitutional actions would be insulated from judicial purview, a result posing serious due process difficulties. *See Johnson v. Robison*, 415

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[23]*See, e.g.*, Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'NonStatutory' Judicial Review of Federal Administrative Action." 81 Harv. L. Rev. 308, 326 (1967).

[24]A slight ambiguity exists in 5 U.S.C. § 703 which permits judicial review in a "court of competent jurisdiction." But rather than imply that the A.P.A. is not an independent source of subject-matter jurisdiction, this condition "can reasonably be read as a recognition of generally applicable venue requirements." *Pickus v. United States Bd. of Parole, supra*, 507 F.2d at 1110 n.5.

[25]The A.P.A. is inapplicable where other "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As has been noted in Part I.A.2.(b), *supra*, however, section 405(h) of Title 28 does not speak this broadly. It only bans specific forms of review which do not include A.P.A. jurisdiction. Because section 41 contains no reference to any A.P.A. provision, it surely does not bar A.P.A. review.

U.S. at 366-67; *Murray v. Vaughn*, 300 F.Supp. 688, 695 (D.R.I. 1969).

B. Because A Three-Judge Court Was Required To Hear This Case, Appellate Jurisdiction Lies In This Court

Appellant's complaint sought injunctive relief based upon due process and equal protection grounds preventing the Secretary from refusing to grant him and his class "child's insurance benefits merely because they are illegitimate and unable to establish that their father lived with or supported them" (App. 10). This request surely brought this case within the confines of 28 U.S.C. § 2282:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge there of unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appellant and his class met these three-judge court requirements. First, their claim is in no way "insubstantial," as required, for example, by *Zemel v. Rusk*, 381 U.S. 1, 6 (1965). Second, their complaint sought equitable relief "to interdict the operation of a [federal] statutory scheme," *Flemming v. Nestor, supra*, 363 U.S. at 607, of nation-wide proportions. *See, e.g., Zemel v. Rusk*, 381 U.S. at 7 n.4. *Compare Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963). Finally,

this direct restraint was based upon allegations of unconstitutionality of a portion of an Act of Congress, *see, e.g., California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), which was frontally challenged and not "merely drawn in question." *See International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 250 (1938).

Having met the preconditions for the convening of a three-judge district court, appellant's avenue of appeal was to this Court:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253. Appellant and his class were denied a permanent injunction. As shown above, theirs was a "civil action" required by an "Act of Congress," 28 U.S.C. § 2282, to be "heard and determined by a district court of three judges." Appellate jurisdiction therefore properly rests in this Court. *See Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *MTM, Inc. v. Baxley*, ____ U.S. ____ (1975).

II.

THE SOCIAL SECURITY ACT'S REQUIREMENT THAT APPELLANT'S CLASS OF ILLEGITIMATE CHILDREN PROVE THEY WERE SUPPORTED BY OR LIVED WITH THEIR FATHER, WHICH IS NOT REQUIRED TO BE PROVEN BY LEGITIMATE AND OTHER ILLEGITIMATE CHILDREN, SERVES NO VALID LEGISLATIVE PURPOSE AND IS VIOLATIVE OF FIFTH AMENDMENT DUE PROCESS

Appellant and his class show below that the extra "support or residency" proof requirement imposed on them by 42 U.S.C. § 416(h) (3) (C) (ii), but not imposed on other children applying for their natural father's child's insurance benefits, promotes no legitimate governmental purpose. It accordingly denies appellant and his class equal protection as is embodied in the Fifth Amendment to the United States Constitution.

A. Discriminatory Classifications Against Illegitimate Children Must Be Subjected To Strict Judicial Scrutiny

The invidious discrimination challenged in this action is primarily between legitimate children and illegitimate children. In order to establish eligibility for child's insurance benefits, legitimate children are not required to establish that they were supported by or resided with their father prior to his death, but appellant's class of illegitimate children is required to shoulder this extra

burden. Although the Act also discriminates between classes of illegitimate children by presuming actual dependency for some of them and not others, this does not distract from the legitimate/illegitimate dichotomy. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). *Cf. Frontiero v. Richardson*, 411 U.S. 677 (1973).

This case thus poses two levels of discrimination: legitimates versus illegitimates and some illegitimates versus other illegitimates. The classifying factor in the first is status of birth, while that in the second is not. The presence in this case of the first form of discrimination makes this a case for the application of the strict scrutiny standard.[26]

In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court reiterated that certain "suspect" classifications are granted its "most exacting scrutiny." *Id.* at 28. It listed the "traditional indicia of suspectness" of a class as one which has traditionally been "saddled with ... disabilities" and "subjected to ... a history of purposeful unequal treatment." *Id.* Persons falling within such a class are "relegated to such a position of political powerlessness as to command

[26]If, for example, a previously all-white school admitted Black students who were taking "academic" courses but would not admit those taking "vocational" courses, it would surely be practicing racial discrimination against a class of Black students. The fact that it also discriminated between two groups of Black students would not somehow make its discrimination against Black vocational students more constitutionally permissible. The strict scrutiny standard of equal protection would still apply to this form of discrimination.

extraordinary protection from the majoritarian political process." *Id.*

When the strict scrutiny test is applied, the governmental classification "is not entitled to the usual presumption of validity." *Id.* at 16. Instead, the Government must carry a "heavy burden of justification" that its classification has been "structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." *Id.* at 16-17.

Appellant submits that illegitimate children fall well within the Court's test as a "suspect class." Like race and national origin, illegitimacy is "an immutable characteristic determined solely by the accident of birth." *See Frontiero v. Richardson*, 411 U.S. at 686, citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 175. Accordingly, "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.* at 175. Illegitimate children, like Blacks, aliens, and other minorities, have traditionally been saddled with disabilities[27] and subjected to "social opprobrium." *Id.* at 176. Because of their socially imposed stigmas of

[27]Many of the cases which involve some of these disabilities are listed by the court in *Lucas v. Secretary of HEW*, 390 F.Supp. 1310, 1317-19 nn.6 & 7.

inferiority[28] and usual life of indigency,[29] illegitimate children have surely been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Compare San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 28.

Although a majority of the Justices individually have indicated in some form their preference for the strictest standard of judicial inspection regarding discriminatory classifications against illegitimate children,[30] the Court

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[28]*See generally* Krause, Legitimacy: Law & Social Policy (1971).

The majority of illegitimate children born in the United States are nonwhite. In 1965, approximately 167,500 nonwhite illegitimate births and 123,700 white illegitimate births were estimated. *See* National Center for Health Statistics, Public Health Service, U.S. Dept. of H.E.W., "Trends in Illegitimacy-United States-1940-1965" at 8 (Washington, D.C. 1968). The nonwhite illegitimate birth rate is about eight times the white illegitimate birth rate. *Id.* at 4.

Illegitimate children generally begin life on an unhealthy footing. More often than legitimate children, they are born prematurely and are underweight at birth, *id.* at 17, and have received less prenatal care and have had more prenatal complications. *Id.* As a result, their risk of death at birth is up to 50% greater than for legitimate births. *See id.* at 21.

[29]"Common observation teaches that illegitimacy and indigency are often handmaidens." *Griffin v. Richardson*, 346 F.Supp. at 1232.

[30]*See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 60 (Stewart, J., concurring); *id.* at 108 (Douglas & Marshall, JJ., dissenting); *Frontiero v. Richardson*, 411 U.S. at 686 (plurality opinion). *Cf. Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

has not yet been forced to officially resolve this issue.[31]

It is nevertheless clear that a certain high-level standard has been accepted by the Court. First, the "traditional" equal protection test of *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), is not applicable in a case such as this where the challenged form of discrimination does not exist for the purpose of achieving a "necessary allocation of finite resources." *Jimenez v. Weinberger*, 417 U.S. at 634 (1974). Just as in *Jimenez*, the Secretary has made no "finite resources" argument in this case. Thus, it is at least clear that the challenged classification must be supported by more than just "some reasonable basis."

Second, *Weber v. Aetna Casualty & Surety Co., supra*, establishes that the proper test at least approaches the "strict scrutiny" standard. *Weber* acknowledged that the Court is empowered by equal protection requirements "to strike down discriminatory laws relating to the status of birth where ... the classification is justified by no legitimate state interest, compelling or otherwise." 406 U.S. at 176.

It is therefore not enough for the challenged classification to merely have "some reasonable basis" which may be supported by "any state of facts reasonably ... conceived to justify it," as in *Dandridge v. Williams*, 397 U.S. at 471. Nor can a disadvantageous

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[31]*See Jimenez v. Weinberger*, 417 U.S. at 631-32 (1974). *But cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 176 n.14. This uncertainty has created considerable confusion among lower courts. *See, e.g., Griffin v. Richardson*, 346 F.Supp. 1226, 1232-34 (D. Md.), *aff'd* 409 U.S. 1069 (1972); *Severance v. Weinberger*, 362 F.Supp. 1348, 1352 n.14 (D.D.C. 1973); *Miller v. Laird*, 349 F.Supp. 1034, 1039-43 (D.D.C. 1972).

classification of illegitimate children survive judicial scrutiny if it "is not made with mathematical nicety, or because in practice it results in some inequality," as was permitted in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Instead, clearly articulated legislative objectives must be present and the Court will not reach out for and speculate as to permissible legislative interests that might conceivably be promoted by the classification. *Cf. Jimenez v. Weinberger*, 417 U.S. at 633. Furthermore, the Court will not tolerate in this area of heightened scrutiny generalized prophylactic rules which avoid the need for individualized determinations. *Compare Weinberger v. Salfi*, ____ U.S. ____ (1975), *with Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) *and Reed v. Reed*, 404 U.S. 71, 76 (1971). Finally, the Court will demand accurate factual support for legislative presumptions, and will not easily accept vague rationalizations. *See United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). *Weinberger v. Wiesenfeld*, ____ U.S. ____, ____ n.16 (1975).

Because of the special degree of judiciary scrutiny which this classification requires, appellant and his class of illegitimate children assert, as has been explained in *Rodriguez, supra*, that the burden of justification for the extra condition of eligibility placed upon them rests with the Secretary. 411 U.S. at 16-17. *See also Frontiero v. Richardson*, 411 U.S. at 689. Furthermore, to pass constitutional muster, this classification must be precisely drawn and "structured with 'precision' " by use of the "least drastic means" available to serve its purposes. 411 U.S. at 16-17. Regardless of whether a

"strict" or "middle level" standard of review is employed, this Court's review must be penetrating, and the Secretary's excuse for perpetrating this discrimination must be thoroughly convincing.[32]

B. The Replacement Of Actually Received Support Is Not A Purpose Of The Child's Insurance Program, Nor Is The Act Suitably Tailored To Achieve This End

The Secretary and the majority of the court below have taken the position that the purpose of the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) was to insure that child's insurance benefits were used to replace actual support lost by a child when his or her father died (App. 46 & 75). These benefits would accordingly not be intended to provide posthumous support to those who did not receive significant support from their father prior to his death. In the district court's words, the child's insurance benefit program was never intended to cover Gregory Norton or the class he represents" (App. 50). After accepting this notion, the court upheld the Act's "support or residency" requirement as a legitimate tool to further this purpose.

Appellant and his class agree that the entire Social Security system is structured so that its benefits are

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[32]The district court did not take this route. Although claiming otherwise (App. 39), it frequently lapsed into measuring the validity of 42 U.S.C. § 416(h)(3)(C)(ii) by the *Dandridge* standard (App. 45-46, 48-49, 50).

paid to covered wage earners and their dependents. When a wage earner retires, becomes disabled, or dies, social security O.A.S.D.I. benefits will attempt to provide economic security to the wage earner, if living, and to those who would look to him or her for their economic support.

The Secretary and majority of the district court, however, have taken a much too narrow reading of which "dependents" are to be protected by the Act. As is shown below, Congress actually intended child's insurance benefits to be received not just by those who were in fact supported prior to their father's death, but also those who were owed an obligation of support which was never fulfilled. This being Congress' overall purpose, the "support or residency" requirement deviates from this goal insofar as it affects illegitimate children. Furthermore, even if such a purpose were assumed to exist, it has not been achieved in a legitimate fashion. Such a purpose cannot therefore sustain the validity of the support or residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii).

1. The Evolution Of The "Support Or Residency" Requirement

In 1939 Congress amended the Social Security Act to establish a national program of survivors' benefits. It replaced the previous protection given a wage earner's survivors – a lump sum payment upon death to his estate[33] – because these payments were "small and

[33]*See* Social Security Act of 1935, Title II, § 203(a), 49 Stat. 622.

inadequate . . . and entirely unrelated to the needs of the recipients . . . ." H. R. Rep. No. 728, 76th Cong., 1st Sess. 11 (1939). The amendments were enacted to "substitute monthly benefits for those groups of survivors whose probable need is greatest. These groups are widows over 65, widows with children, orphans, and dependent parents over 65." *Id.* The amendments were therefore structured to protect dependents of the deceased wage earner: those who had been in a position to look to the deceased for support.[34]

The portions of the survivors' program that specifically pertained to orphans were similarly patterned upon presumed dependency. Because it was assumed that "a child is normally dependent upon his father or adopting father . . . ,"[35] the amendments deemed such a child to be dependent.[36] The amendments dealt differently with other categories of children who presumably could look elsewhere (to another supporting father) for their

[34]As Dr. Arthur J. Altmeyer, the Chairman of the Social Security Board, explained to the House Ways and Means Committee:

> When we suggest substituting widows' and orphans' benefits for the present lump sum, we do so because experience has shown that widows and orphans of men who died prematurely are, in a great proportion of the cases, in need. . . . the whole pattern of benefits under this insurance system . . . [is geared] on the whole to the needs of the potential recipients of those benefits.

Hearings Relative to the Social Security Act Amendments of 1939, 76th Cong., 1st Sess. 2263 (April 3, 1939).

[35]H.R. Rep. No. 728, 76th Cong., 1st Sess. 36 (1939).

[36]Section 202(c)(3) of the 1939 amendments, provided for this presumption. It has been carried forward to the present. *See* 42 U.S.C. § 402(d).

support. Pursuant to section 202(c) (3) of the 1939 Act, those children who (a) were not legitimate or adopted, (b) had been adopted by someone other than the deceased wage earner, or (c) were living with or supported by a stepfather (not the deceased wage earner) were required to show, in order to establish their dependency, that they were "living with or supported by" the wage earner at the time of his death. *See* H.R. Rep. No. 728, *supra,* at 36.

The purpose of the "support or residency" requirement was therefore logical and legitimate. Those who had a right of support resting in someone other than the deceased wage earner would be expected, absent proof otherwise of actual support from the deceased wage earner, to have been cared for by their adopting father or stepfather.[37] The amendment would not allow them a double recovery from both potential sources of support.

This plan, of course, had a major flaw. It lumped illegitimate children in with those who had a new father substitute and therefore an alternative source of support, a category into which they did not correctly

[37]Adoptive parents are responsible for the support of their adoptive children; an adoption usually extinguishes the natural parents' duty to support. *See* H. Clark, Domestic Relations § 18.9, p. 659.

Step-parents had no common-law duty to support step-children, unless they had voluntarily assumed this duty. *Id.* § 6.2, p. 188. Some State statutes impose support requirements on step-parents where the natural parents are dead or unable or unwilling to support their children. *Id. See generally Lewis v. Martin,* 397 U.S. 552 (1970).

fall. Similarly, it was incorrect to assume that, like adopted children and stepchildren, they no longer had a need to exercise their natural father's obligation to support them. Thus, in 1939, Congress began its pattern of discrimination against illegitimate children.

In addition to the discriminatory "support or residency" requirement, Congress in 1939 subjected illegitimate children to a second obstacle. There was only one method by which they could become eligible for their natural father's survivors' benefits. They must have had to have been eligible to inherent their father's property under their State's intestacy laws.[38] Failing at this, insurance benefits were denied them.

About twenty-five years later a more magnanimous Congress sought to correct this second flaw in the child's insurance program. In 1965, Congress amended the Act to its present form to give illegitimate children alternative means of establishing their eligibility for their father's survivors' benefits.[39] Illegitimate children

[38]*See* 53 Stat. 1378, § 209(m).

[39]The following legislative history sets forth the reasoning behind these amendments:

> The social security program is national in scope, covering the worker without regard to the State in which he resides, and the program is intended to pay benefits as a partial replacement of lost support to those relatives of the worker who normally look to him for support. The Council believes that in such a program whether a child gets benefits on the earnings record of a person who has been determined to be his father, and who has an obligation to support him should not depend on whether he can inherent the person's intestate property under the laws of the State in which the person happens to live.

Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement 67 (1965).

can now establish their eligibility by showing that their parents went through a flawed marriage ceremony, 42 U.S.C. § 416(h) (2) (B); that their father acknowledged their paternity in writing or the same was done by a court order, 42 U.S.C. § 416(h) (3) (C) (i); or that other satisfactory evidence exists of their father's paternity, 42 U.S.C. § 416(h) (3) (C) (ii).

Unfortunately for appellant's class, however, Congress failed to fully eliminate the "support or residency" inequity. It did extend the presumption of dependency to the illegitimate children establishing paternity under 42 U.S.C. § § 416(h) (2) (B) and (h) (3) (C) (i). *See* 42 U.S.C. § 402(d) (3). It failed in this respect, however, regarding appellant's class. Thus, today appellant's class of illegitimate children are still lumped together with children adopted by someone else and those who have become supported stepchildren, *compare* 42 U.S.C. § 402(d) (3) (A) *with* 42 U.S.C. § 402(d) (3) (B) & (4), and accordingly still have to establish that they lived with or were supported by their father. *See* 42 U.S.C. § 416(h) (3) (C) (ii).

2. Congress Intended Child's Insurance Benefits To Replace The Loss Of The Right To Receive Support, Not Merely Actual Support

a. Congressional History Indicates that Child's Insurance Benefits Were Not Intended Merely to Replace Lost Support

The district court's conclusion that the Act merely intended to replace lost support was based upon its reading of part of the relevant legislative history. In

amending the Social Security Act in 1965 to establish the disputed child's insurance provisions, the Senate Report described the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies . . . ."[40] This sentence could, of course, also be read so as to include those children who lost the "right" to receive support from their deceased father, even though he never honored this right.

The correctness of this latter reading is indicated by the legislatively more crucial House-Senate Conference Committee Report which stated that child's insurance benefits were intended to be granted "if the father was supporting the child or had a legal obligation to do so."[41] This purpose was reiterated by the 1965 Report of the Advisory Council on Social Security which also referred to "an obligation to support," rather than to the need to have actually received support.[42]

The explicitness of these latter two indicators of legislative intent should dispel the notion that the child's insurance benefits program was not intended for

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[40]S. Rep. No. 404, 89th Cong., 1st Sess. 110; 1965 U.S. Code Cong. & Adm'n News 2050.

[41]House-Senate Conference Comm. Rep. on 1965 Amendment to Social Security Act, 111 Cong. Rec. 18387 (July 27, 1965). *Accord* Committee Print "Summary of Major Provisions of Public Law 89-97, The Social Security Act Amendments of 1965" Committee on Ways and Means, 89th Cong., 1st Sess. 14 (Sept. 1965).

[42]Report of the Advisory Council on Social Security, "The Status of the Social Security Program and Recommendations for Its Improvement" 67 (Washington, D.C., 1965).

those, like Gregory Norton and his class, who were entitled to support from their father,[43] but who unluckily never received it. At the very least, the clear and chronologically later words of the Conference Committee should outweigh those of the earlier Senate Report. Accordingly, the district court fatally misread congressional intent.

b. The Act Is Structured So That Child's Insurance Benefits Do Not Merely Replace Lost Support

If the Act actually intended to require that its benefits would only go to those children who had actually been supported prior to their father's death, it is in no way structured to meet this goal. Other than in 42 U.S.C. § 416(h) (3) (C) (ii), which applies to Gregory Norton's class, the Act contains no pre-condition requiring proof of actual support in order to qualify for child's insurance benefits. To be eligible for these benefits, legitimate children need not have actually received support from their fathers prior to his death. Similarly, illegitimate children whose parents went through an abortive marriage ceremony, who can take under their state's intestacy law, or who possess a court support order, paternity order, or written

[43] As is generally the case on a nation-wide basis, *See* H. Clark, Domestic Relations, § 5.3, p.162 & n.4; § 6.2, p.187 (1968 ed.); *Gomez v. Perez*, 409 U.S. 535 (1973), Maryland too requires fathers to support their children, be they legitimate or illegitimate. *See* Md. Code Ann. Art. 27, § 88(b); Art. 16, § 66A & H; *Fiege v. Boehm*, 210 Md. 352, 359, 123 A.2d 316, 320-21 (1956).

acknowledgement of paternity need not have actually received support prior to their father's death in order to be eligible for child's insurance benefits. If this were a real purpose of the Act, why did Congress only seek to fulfill it with respect to one class of illegitimate children?

The district court sought to avoid this latter question by speculating that Congress intended benefits for those "more likely" to have been actually supported prior to their father's death (App. 48-49). Therefore, Congress apparently concluded that the fathers of legitimate children and the several other subclasses of illegitimate children "more likely" supported their offspring, while this same result did not obtain for Norton's class. To reach this conclusion, however, the district court relied on no indication of Congressional intent. Indeed, it even failed to establish that its speculation as to who was or was not more likely to have been supported bore any relationship to reality.

A 1970 welfare study, one of the few available for these purposes, showed that absent *married* fathers failed to support their legitimate children 81.7 percent of the time, while absent *unmarried* fathers of illegitimate children similarly failed to provide actual support 89.8 percent of the time.[44] This, of course, strongly contradicts the notion that all married fathers

[44] *See* Kaplan, Support from Absent Fathers of Children Receiving Aid to Dependent Children, 1955 U.S. Dept. of H.E.W., Social Security Adm'n, Bureau of Public Assistance at 17, 24, 35 & 39 (Washington 1960) *quoted in Watts v. Veneman*, 334 F.Supp. 482, 487 n.6 (D.D.C. 1971), *aff'd in part, r'v'd in part*, 476 F.2d 529 (D.C. Cir. 1973).

"more likely" support their legitimate children. A mere eight percent differential between the support rates of absent fathers of legitimate and illegitimate children could hardly form the basis of a generalization as broad as that reputed to Congress in this instance.[45]

The same lack of factual support exists for this presumption with respect to illegitimte children who are excluded from having to prove actual support because they qualified for benefits under 42 U.S.C. § 416(h) (3) (C) (i) (III) by possessing court support orders against their father. In 1971, for example, less than 25 percent of the parents and spouses who were under a court support order in Baltimore City were actually making support payments.[46] It was estimated at that time that there were more than $10 million outstanding in uncollected support payments. After a computer study in 1973, this figure was adjusted upwards to $65 million; it represented the amount owing in Baltimore City from about 39,000 fathers to their wives and children.[47] Because it appears that Baltimore fathers are in no way different than those elsewhere with respect to their diligence in obeying court-support orders,[48] the

[45] *Accord Beaty v. Weinberger*, 478 F.2d 300, 306 n.9 (5th Cir. 1973), *aff'd* 418 U.S. 901 (1974).

[46] *See* "City Seeking Aid to Enforce Support-Payment Collection," The Sun, p. C5 (Jan. 11, 1971) (App. 63).

[47] *See* "Computer Puts Non Support At $65 Million in City," The Evening Sun, p. C1 (March 27, 1973) (App. 65).

[48] A 1974 General Accounting Office study "limited to fathers who had agreed to make child-support payments, either under a court order or voluntarily . . . found widespread lack of compliance." "Welfare Abuses by Fathers Cited," New York Times (Dec. 7, 1974). "Only one-quarter of the fathers who had agreed to make support payments were regularly paying at least 90 percent of what they were supposed to pay." *Id.* Furthermore, "the over-all noncompliance record of fathers of children on welfare was not significantly different from what has been found in other studies of child-support payments that were not limited to welfare recipients." *Id.*

district court's presumption[49] regarding compliance should in fact be the opposite. Fathers of children with a court support order are "more likely" to have *not* supported their children.

The likelihood for the other excused subcategories of child applicants to have actually been supported is surely as uncertain as the two just examined. Only unfounded speculation could conclude that children whose fathers have acknowledged them in writing or who could receive property under a state intestacy statute are more likely to have received support prior to their fathers' deaths.[50] Such inexact speculation should have no place in a case dealing with discrimination against illegitimate children. *Cf. Jimenez v. Weinberger*, 417 U.S. at 633. Furthermore, when illegitimacy is involved, a "more likely" standard is far too lax. Under the strict scrutiny test or even the *Weber* test, it is highly doubtful that even "almost all" would be enough.

[49] The district court stated: "When an order of support is entered by a court, it is reasonable to assume compliance occurred." (App. 48).

[50] In Maryland, for example, the intestate succession law, which took effect in January 1970, Md. Code Ann. Art. 93, § § 1-205 & -208 (1970), allows an illegitimate child to receive his deceased father's property if, *inter alia*, he "openly and notoriously recognized the person to be his child . . . ." If Gregory Norton's father had died after 1970, Gregory surely could have met this test. By doing so, however, nothing is really proven regarding whether his father was likely to have actually supported him.

c. Jimenez Rejected a Reading of the Act Limiting its Benefits to Those Who Received Prior Support

This Court's opinion in *Jimenez v. Weinberger, supra*, clearly rejected any congressional purpose to require a child beneficiary to have been actually supported *prior* to the onset date of the age, disability or death giving rise to eligibility.[51] 417 U.S. at 634. If no actual support requirement existed prior to disability or death, it is difficult to imagine where such a purpose would come from requiring any other form of actual support.[52]

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[51] *Jimenez* stated that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." 417 U.S. at 634. The district court read this reference to "dependents" to include only those who were dependent and actually received support, not those who were dependent but whose fathers failed in their duty of support (App. 75). Another district court, however, has reached the conclusion that *Jimenez* fully rejected any actual support requirement. *See Adams v. Weinberger*, C.C.H., Unemployment Ins. Rptr. ¶14,001, p. 1906. The *Adams* impression is easily obtained. *Jimenez* stated:

> The Secretary maintains that the Act denies benefits to afterborn illegitimates . . . because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner . . . . Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability . . . . We do not read the statute as supporting that view of its purpose.

417 U.S. at 634.

[52] Significantly, *Jimenez* relied upon the same indicators of congressional intent as do appellants. *See* 417 U.S. at 634 n.3. These legislative sources refer not only to actual support provided, but also the "obligation" to provide support.

d. In Another Forum The Secretary Has Admitted that the Act Was Intended to Extend to Those With a "Right to Support"

In *Lucas v. Secretary of H.E.W.*, 390 F.Supp. 1310 (D.R.I. 1975), a case raising the same issue on the merits as this case, the Secretary admitted to the district court that Congress did not intend the child's insurance program to merely replace support actually lost, but rather to grant benefits to those enjoying "the right to support." *Id.* at 1320. The Secretary cannot, of course, have it both ways. His statement in *Lucas*, perhaps made in reaction to *Jimenez*, severely undermines any present attempt he might make in this Court to assert the contrary.

e. The Harsh Impact of the District Court's Notion of Congressional Purpose Makes it Unlikely that Congress Intended Such a Result

In order to ascribe to Congress an intent to aid only those children whose fathers actually gave them financial support, a court would have to imagine that Congress would intend to deny benefits to those who are most in need of them. If, for reasons beyond the control of an illegitimate child in appellant's class, his or her father refused to support him or her during his life, that child has even greater needs for child's insurance benefits. Because "illegitimacy and indigency are often handmaidens,"[53] Congress would have had to

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[53] *Griffin v. Richardson*, 346 F.Supp. 1226, 1232 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

intend a double injury for such a child: no adequate support prior to the father's death and no death insurance benefits after it. Because the Social Security Act is intended to work in a humanitarian manner,[54] it should strain a court's credibility to lay such an intent at Congress' door.

3. Even If Congress Did Intend Child's Insurance Benefits To Only Replace Actually Received Prior Support, It Achieved This Result In An Arbitrary and Invalid Manner

If it could be said that the child's insurance program was intended only to give financial assistance to those children who previously were supported by their fathers, the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) would still be invalid because it would achieve this purpose in an arbitrary and capricious manner. Most of this arbitrariness has been outlined above.

First, if such indeed were the program's purpose, there is no good reason why it only singles out appellant's class as having to establish this condition. Just as in *Jimenez*, it excuses many other children from having to meet this condition who could not in fact do so. The promotion of such a purpose would therefore

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[54]The congressional policy underlying the federal social security legislation requires courts to interpret the Act liberally, and any doubts should be resolved in favor of coverage.

Herbst v. Finch, 473 F.2d 771, 775 (2d Cir. 1972), quoting *Rasmussen v. Gardner*, 374 F.2d 589, 594 (10th Cir. 1967).

be done in an arbitrary "over inclusive" manner. 417 U.S. at 637. It is arbitrary to deny benefits to one class of illegitimate children because their fathers failed to support them, while giving all other classes of legitimate and illegitimate children benefits regardless of their fathers' support.

Second, even if there were some logic to assuming support for all groups except appellant's, it is unfair to single out a group and punish it for nothing which it could control. Appellant's class of illegitimate children are obviously not at fault for their fathers' misdoings. It is bad enough that they were not supported during their fathers' lives. It absurdly compounds this tragedy to again deny much needed support after their fathers' death.

Third, even when seen from the nonsupporting father's perspective, the support and residency requirement is arbitrary. Each class member's father was a covered wage earner under the Social Security Act. He paid into the Social Security Trust Fund in order to support himself and his dependents upon his old age, death, or disability. Under the Secretary's reading of 42 U.S.C. § 416(h) (3) (C) (ii), his child's insurance benefits will now be paid to no one.

The discrimination in this case is very similar to that encountered by the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a servicewoman could not receive fringe benefits for her husband unless she proved that he was actually dependent upon her for over one-half of his support. On the other hand, it was presumed that the wives of servicemen were dependent on their husbands. This classification was also justified on the grounds of estimates of who was more likely to

be a dependent. The support of residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii) works the same disadvantage upon appellant's class of illegitimate children as did the similar classification in *Frontiero*. The constitutional result should therefore be the same.

If "actual support" were a purpose of the child's insurance benefit program, it is structured not to fairly achieve this purpose. There is no fair precision or accurate tailoring in an Act which presumes illegitimate children with a court support order will in fact be supported when real life statistics show otherwise. Not only has the Secretary failed to factually support Congress' supposed presumptions, but most of them can be shown to be totally incorrect. Such an unsupported conglomeration of false assumptions cannot add up to a valid formula to deny appellant's class child's insurance benefits. Section 416(h) (3) (C) (ii)'s gross inaccuracies could not pass judicial scrutiny even if it were not a suspect class that is being discriminated against. The fact that this disability bears absolutely no "relationship to individual responsibility or wrongdoing" should make its arbitrariness and consequent invalidity even more certain.

C. Section 416(h) (3) (C) (ii) Does Not Serve, Nor Was Intended To Serve Any Legitimate Purpose In Guarding Against Fraudulent Claims Of Paternity

As has been shown in the preceding sections, the "support or residency" requirements in the Act were developed by Congress as a means of establishing dependency for those persons who were not entitled to

support by the deceased wage earner and who normally would look to other sources of support but who (such as a parent or stepchild) nevertheless may actually have been dependent. The clear congressional purpose of this condition of eligibility for survivors' benefits was therefore to provide a means to establish dependency for those not otherwise entitled to support.

There is nevertheless a second potential purpose which the "support or residency" requirement of 42 U.S.C. § 416(h) (3) (C) (ii) might arguably have been intended by Congress to serve. This is the easily asserted catchall that this extra condition of eligibility was intended to guard against fraudulent claims for child's insurance benefits. The clarity of the Act's concern for establishing dependency with this requirement, however, dispels the possibility of any other intended purpose.

At earlier stages in this litigation the Secretary attempted to justify the "support or residency" requirement as a necessary means to prevent spurious claims. Later, however, the Secretary did, correctly we believe, abandon this purported purpose and the district court failed to even dignify it by mentioning it. Consequently, it is doubtful that any argument could persist in this case that this was actually a bonafide congressional goal which the subsection was intended to promote. Nevertheless, because of the facility with which this purpose can almost always be raised,[55]

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[55]Prevention of spurious claims has often been asserted as a statute's "rational basis" in similar cases before this Court. *See, e.g., Jimenez v. Weinberger*, 417 U.S. at 633-34; *United States Dept. of Agriculture v. Moreno*, 413 U.S. at 535; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174.

appellant anticipates it being raised again in this setting and deals with it below.

As best stated, Congress could be seen as requiring that Norton and his class establish firmer proof of their fathers' paternity. Thus, if an illegitimate claimant were not to establish his or her father's paternity by any of the specifically approved methods (court order, written acknowledgement, etc.) but had to resort to unspecified methods, at least the inferences to be drawn from a finding of support or residency would help weed out fraudulently conceived claims. Although the erection of safeguards regarding the proof of an illegitimate child's paternity are admittedly legitimate congressional enactments,[56] 42 U.S.C. § 416(h) (3) (C) (ii) does not really pursue this goal.

1. The Words Of The Act Preclude The "Spurious Claim" Purpose

The best place from which to discern the intended purpose of a statute lies in its own words. Section 416(h) (3) (C) (ii) allow child's insurance benefits when

> such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

As can be seen, the first clause (before the comma) requires proof of paternity; the second clause (after the

[56] *See, e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174; *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

comma) requires proof of support or residence. The two elements are styled so as to be independent of one another. The support or residency requirement is not necessarily just another way to prove paternity. It is a condition that must be met *in addition to* proving paternity. In the district court's words, the Act requires that "the dual elements of paternity and dependency" be proven by this class of illegitimate children (App. 47-48). Thus, as in Gregory Norton's case, even if paternity is satisfactorily proven to the Secretary, residence or support must also be proven in order to establish eligibility.

The Social Security Administration has itself made this point in an even clearer fashion. In its Social Security Claims Manual, which instructs all local Administration employees on how to administer the benefits program, it is clearly pointed out that paternity and support or residence are two distinct and unrelated preconditions of eligibility:

> In addition to establishing paternity based on "other evidence" [under 42 U.S.C. § 416(h) (3) (C) (ii)] it is also necessary to establish that the child was either living with or being supported by [the wage earner] at the pertinent time.[57]

The Secretary's Claims Manual interpretation of the Act's requirements is also such as to show that paternity could be proven by any "satisfactory evidence" and that the "support or residency" requirement is not a mandatory form of proof which is required to bolster proof of paternity:

[57] Social Security Claims Manual § 2428.5 (Development of Other Evidence), *See also id.* at § 2425(b).

> The evidence must identify the child in question and must establish that the WE [wage earner] is the biological father of the child. There is no requirement that the evidence be in any specific form. Satisfactory evidence may include a court decree, court order, or written acknowledgment which establishes paternity but which was made too late to qualify the child under [42 U.S.C. § 416(h) (3) (C) (i)]. Statements by the WE's relatives that the WE considered the child his own may also constitute evidence.[58]

Because, by the words of the statute and the Secretary's interpretation, paternity must already have been proven before the second requirement – support or residence – is taken up, this latter requirement can surely not be viewed as existing to insure an accurate paternity finding. Although on occasion it might coincidentally do so, its purpose is clearly to establish an additional requirement of eligibility, not just to reinforce the first one.

2. The Secretary Has Now Abandoned The "Spurious Claim" Purpose

At the inception of this litigation, the Secretary asserted that a purpose of section 416(h) (3) (C) (ii)'s support or residency requirement was to guard against spurious claims of paternity made by fraudulently motivated applicants.[59]

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[58] *Id.* at § 2427.5 (Other Satisfactory Evidence Defined).

[59] *See* Memorandum in Support of Defendant's Motion to Dismiss, etc., at 16 (filed June 21, 1972); Defendant's Reply Brief at 8 (filed August 22, 1972).

That view of Congress' potential reasoning with respect to 42 U.S.C. § 416(h) (3) (C) (ii) has now apparently been abandoned by the Secretary. He did not reassert it as a potential "rational basis" in the last three memoranda he filed with the district court.[60] Indeed, he appears to have now specifically rejected this reading of congressional purpose. He has described the "support or residency" requirement to provide that

> in addition to a showing of paternity, these claimants must show factors which would tend to establish their economic dependency upon the deceased wage earner.[61]

The district court also embraced this same view. In explaining the "whole thrust" of section 416(h) (3) (C) (ii), it stated:

> the provision requires some proof sufficient to the Secretary of actual paternity. It then requires proof that the illegitimate child whose paternity is proven establish either that he or she actually was supported by ... or ... lived with the wage earner .... (App. 48).

Therefore the Secretary and the district court agreed that the "support or residency" condition was not

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[60] *See* Supplemental Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, Summary Judgment, pp. 3-6 (filed March 21, 1973); Defendant's Memorandum on Remand, pp. 6-9 (filed Aug. 16, 1974); Defendant's Reply to Plaintiff's Memorandum on Remand from the United States Supreme Court, pp. 6 & 7 (filed Aug. 30, 1974).

[61] Supplemental Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, *supra*, at 6.

established by Congress as a means to guard against spurious paternity claims, but rather to establish prior economic support.

3. No Observable Congressional Intent Supports The "Spurious Claim" Purpose

When dealing with discriminatory classifications adversely affecting illegitimate children, courts should not, with the comfortable advantage of hindsight, engage in speculation as to what Congress might have intended. *Cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 632 (Powell, J., concurring). Instead, the declaration of congressional intent must be direct and obvious. To be certain that Congress meant it, it must have been legislatively "articulated." *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 17.

Nowhere in the legislative history of the original child's insurance benefits legislation[62] or its later amendment regarding the granting of these benefits for illegitimate children[63] is there the slightest indication

[62] *See* Report of the Social Security Board, Proposed Changes in the Social Security Act, H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939); S. Rep. No. 734, 76th Cong. 1st Sess. (1939); Hearings Relative to the Social Security Act Amendments of 1939 Before House Comm. on Ways and Means and Before Senate Finance Comm., 76th Cong., 1st Sess. (1939).

[63] *See* Report of the Advisory Council on Social Security, "The Status of the Social Security Program and Recommendations for Its Improvement" (1965); S. Rep. No. 404, 89th Cong., 1st Sess. (1965); Conference Comm. Rep. on 1965 Amendment to Social Security Act, 111 Cong. Rec. 19387 (July 27, 1965).

that the support or residency requirement of 42 U.S.C. § 416(h) (3) (C) (ii) was intended to avert spurious claims of paternity.

A reading of the entire Act does show that Congress was aware of the need to prevent spurious claims. In certain parts of the Act which actually deal with fraud prevention, Congress has erected a full complement of safeguards. In the first instance, the claimant has the full burden of proof to establish his or her eligibility for benefits. An applicant under 42 U.S.C. § 416(h) (3) (C) (ii) must present proof of paternity which is "satisfactory to the Secretary." The Secretary thus retains the final say, subject to judicial review, of the existence of paternity. His findings of fact are final and binding, *see* 42 U.S.C. § 405(h), and are conclusive if supported by substantial evidence. *See* 42 U.S.C. § 405(g).

If a fraudulently induced payment should be made, administrative and criminal sanctions can be imposed. If an incorrect overpayment is made, the claimant's future benefits can be reduced in order to recoup the amount of the overpayment, or the beneficiary or his estate can be made to refund the excess amount. *See* 42 U.S.C. § 404(a) (1). The Act also makes it a misdemeanor, punishable by up to a $1000 find or one year imprisonment, or both, to fraudulently procure social security benefits. *See* 42 U.S.C. § 408. These provisions are what Congress actually and directly intended as protection against spurious claims.

Absent any clear indication that Congress actually entertained such a thought,[64] and considering the

[64] *Compare* the explicit congressional intent found, for example, in *Weinberger v. Salfi*, ____ U.S. at ____.

special nature of discrimination against illegitimate children, the Court should not engage in unfounded speculation in order to "find" such a congressional purpose.

4. If Prevention of Fraud Were A Purpose Of Section 416(h) (3) (C) (ii), It Has Not Been Validly Achieved

Appellant has just shown that Congress never actually viewed the "support or residency" requirement of section 416(h) (3) (C) (ii) to serve as a potential safeguard against the making of fraudulent claims for child's insurance benefits. If the Court is unconvinced by this position, however, appellant demonstrates below that any attempted pursuit of this goal has been achieved in an arbitrary manner which cannot survive the heightened level of judicial scrutiny applicable to this case.

The most basic flaw with this possible purpose is that it has been attempted in a far too stringent manner. As occurred in Gregory Norton's individual case where the Secretary clearly found paternity to exist (App. 18), this additional condition of eligibility will disqualify persons who are indeed their father's children and therefore intended beneficiaries under the Act. In this sense the extra proof requirement is overly broad. *Compare Jimenez v. Weinberger*, 417 U.S. at 637. And by excusing all other legitimate and illegitimate children from having to meet this requirement, the Act heaps this burden on the one class most desperate for child's insurance benefits – those whose fathers while living ignored them. Appellant submits that it is unfair to

force one class of claimants to establish their eligibility by showing that they lived with or were supported by their parents, when this element is not required for any other natural child.[65] As the Court noted in *Frontiero v. Richardson*, 411 U.S. at 689 n.22, special rules, such as this, which rely on prior economic discrimination often aid and abet the perpetuation of the same disadvantaged position.

Just because the support and residency requirement could be passed off as a safeguard against spurious claims of paternity is no guarantee as to its constitutional validity. The Court has clearly recognized the need for safeguards to ensure actual paternity. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 174. Although these "problems are not to be lightly brushed aside," they nevertheless cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. at 538. Thus, this Court has recognized that not all conditions of eligibility that serve such a purpose can survive equal protection scrutiny. *See Jimenez v. Weinberger, supra.*

It is surely true that those children who can show that their fathers lived with or supported them are more likely to be able to prove their fathers' paternity. Living with and supporting a child is surely an indicator of actual paternity. Nevertheless, many actual fathers, whose paternity is unquestioned, fail to live with or support their children. This is indeed another stigma which many illegitimate children have to endure.

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[65] As was shown in Part II.B.1(b), *supra*, many legitimate and illegitimate children are not in fact supported by their fathers.

The harshest aspect of such a mandatory form of proof is that it severely handicaps the poor and less literate, who unfortunately are highly represented in appellant's class. They come from families who are unfamiliar with the availability of paternity decrees and court support orders to enforce support obligations. Although these avenues may seem reasonable and accommodating to the middle class ethos, they are strange and unfamiliar to the poor. Furthermore, if a mother knows her child's father has no money, he already has enough trouble; why also turn the court bureaucracy against him? And even more logically, why spend endless hours waiting in court and in a prosecutor's office to effect an order with little apparent meaning to a poor family's life?[66]

Similarly, indigents do not neatly transcribe their thoughts for posterity in writing so as to later coincidentally serve as proof for social security benefits. If indigency is a handmaiden of illegitimacy,[67] then illiteracy surely is also. It is unnatural to expect fathers of illegitimate children to perform this act.

It can therefore be seen that the hardship of the "support and residency" requirement falls on those least able to afford it. The Act's available methods of proof, if informal methods are to be excluded, pose an impossible burden for the many children born out of wedlock whose fathers have abandoned them.

It, accordingly, is overreaching to require residence or support (in the absence of formalized proof) as a

[66]Even if a father has financial resources, chances are he will not comply with a court support order. *See* Part II.B.1(b), *supra*.

[67]*See Griffin v. Richardson*, 346 F.Supp. at 1232.

necessary guarantee of paternity. As the Administration's Claims Manual has recognized, paternity can be proven in many other ways. This was indeed done by Gregory Norton. The Veterans' Administration, has also acknowledged the need for broad forms of proof of paternity. In determining issues of paternity for its analogous program of children's benefits, it permits proof by the illegitimate child through, *inter alia:*

> Any other secondary evidence which reasonably supports a finding of relationship, as determined by an official authorized to approve such findings, such as:
>
> (i) A certified copy of the public record of birth or church record of baptism showing the veteran was the informant and was named as father of the child; or
>
> (ii) Statements of persons who know that the veteran accepted the child as his; or
>
> (iii) Information obtained from service department or public records, such as school or welfare agencies, which shows that within his knowledge the veteran was named as the father of the child.

38 C.F.R. § 3.210(b) (3). This wide range of methods of proof is reasonable. It encompasses the means of proof that lower income people can realistically meet. It permits illegitimate children to establish their entitlement with a realistic and relevant system of proofs. It does not punish illegitimate children whose parents are illiterate or unwise in the ways of the court-ordered support system.

Appellant and his class therefore submit that, if the Act is to be read so that the "support or residency" requirement is a mandatory mode by which they must prove paternity, this result will cause unjustified

hardship on the many illegitimate children whose fathers never actually supported them. By disqualifying these intended beneficiaries of the child's insurance benefits system who were entitled to their father's support while living, this classification is arbitrary and capricious. Because it invidiously discriminates against appellant and his class, it should be enjoined and declared invalid as violative of Fifth Amendment due process.

III.

CONCLUSION

For the reasons asserted in Part I above, appellant and his class submit that the district court was empowered to issue class-wide injunctive relief and that jurisdiction over this appeal properly lies in this Court. Because, as is shown in Part II above, no adequate justification exists for requiring appellant and his class in order to qualify for child's insurance benefits to prove, in addition to paternity, that they were living with or supported by their father prior to his death, this requirement invidiously discriminates against illegitimate children. The judgment of the district court should therefore be vacated and reversed and this case should be remanded for the entry of an appropriate declaratory and injunctive decree.

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